APPEAL NO. 92123

On February 26, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding. (Hearing officer) determined that the claimant, respondent herein, sustained a compensable repetitive trauma occupational disease on (date of injury) (the last date of work), in the course and scope of his employment working for (employer), due to heavy lifting mandated by the scope of respondent's work. The employer is a self-insured governmental entity covered by the appellant, in accordance with TEX. REV. CIV. STAT. ANN. art. 8309g (Vernon's Supp. 1992). The appellant is a division of the Texas Attorney General's Office. Art. 8309g, §3. The director of that division acts as adversary before the commission and the courts, and for this purpose is entitled to legal counsel of the Attorney General. Art. 8309g, §4.

The appellant complains that the Assistant Attorney General assigned to the case was not given written notice of the hearing; that the decision that the respondent sustained an occupational disease was not based upon a preponderance of the credible evidence; that the decision that claimant had a disability was not based upon a preponderance of the credible evidence; and, that the hearing officer abused his discretion by finding that the appellant waived its right to present proof by failing to appear at the contested case hearing. Well beyond the deadline for appeal, the appellant submitted "newly discovered information" that it contends was not available to it at the contested case hearing and which it asks to be considered by us in making the decision on this claim.

DECISION

Finding no error in the findings and conclusions of the hearing officer, we affirm his decision.

The hearing was initially scheduled to take place on December 9, 1991. This hearing was attended by the respondent, his wife, and Mr. H, the adjuster for the appellant. A continuance was granted because the Assistant Attorney General who represented appellant had to be present in court in (City), Texas, and there was no other attorney from his division available to cover the contested case hearing. At the conclusion of the brief hearing on the record, the hearing officer announced that a continuance was granted to 8:30 a.m., February 26, 1992. The hearing officer announced that he would enter an interlocutory order to pay benefits to claimant for the intervening period of time.

On February 26, 1992, the hearing was reconvened. No representative for the appellant was present. The hearing officer announced that he had called Mr. H, who told him that with other work he had to do in another city, he had forgotten about the hearing. Mr. H then called the hearing officer back 20 minutes later and reported that the Assistant Attorney General assigned to the case was in trial that morning, and that there was no one else who could appear on appellant's behalf. The hearing officer announced that he would convene and go forward with the hearing. The issues under consideration were whether

respondent sustained an injury in the course and scope of employment, the date of said injury, the length of disability, and whether the carrier had sufficient evidence to contest compensability.

Appellant, who worked with 11 profoundly handicapped adult males at employer, stated that he began working at this particular job in October 1990. As part of his job, he had to lift men weighing between 100-150 lbs. in and out of their wheelchairs. He stated that he noticed around November 1990 that he started feeling pain in his arm and elbow. The pain became progressively worse over the ensuing months. Respondent said he assumed that the cause was arthritis. Respondent then decided to take a vacation to see if the elbow would get better. His last day of work was (date of injury). When the elbow did not get better but began to swell, he went, on July 15, 1991, to his family doctor, Dr. B. X-rays performed for Dr. B found large olecranon spurs in both elbows. Respondent was referred to Dr. W, a practitioner of orthopaedic and athletic medicine. On July 24, 1991, Dr. W diagnosed tendinitis and took him off work. Respondent testified that Dr. W told him his condition was related to his job.

Respondent stated that he reported this condition as a job-related injury to his employer on July 25, 1991. Subsequent evaluation and treatment of respondent by Dr. H and Dr. L indicate nerve entrapment. A September 3, 1991 medical report by Dr. H notes that respondent's job changed in the fall of 1990 and that respondent had a many month history of lifting patients and heavy charts. Dr. H's letter to the Texas Workers' Compensation Commission (Commission), dated October 25, 1991, indicates that there was an acute precipitating event in November 1990 (not described), but that respondent's condition probably goes back to a prolonged history of lifting patients for employer. The letter further states: "[t]here is no doubt in my mind that this thing is work-related or was certainly aggravated by the activities described to me at work . . . ."

Respondent stated that references to November 1990 in any medical reports had to do with his attempts to identify when he first noticed pain. He also noted for the record that the employer had been under investigation during this time for conditions relating to patient treatment, and this required constant lifting of clients in and out of chairs. Respondent stated that no doctor had released him to work, and that light duty, as such, was not available through employer in that it required a full release in order to return to duty. Respondent states that he identified (date of injury), as his date of injury primarily because this was the last day of work, although he did not know until July 24, 1991 that his condition was related to employment.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. Texas Workers' Compensation Act, TEX. REV. CIV. STAT. Art. 8308-6.34(e) (Vernon's Supp. 1992) (1989 Act). His decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d

701 (Tex. Civ. App.-Amarillo 1974, no writ). In reviewing a point of "insufficient evidence," if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, no writ). We do not substitute our judgment for that of the hearing officer when, as here, his findings are supported by some evidence of probative value, and are not against the great weight and preponderance of the evidence. Texas Employer's Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The claimant has the burden of proving, through a preponderance of the evidence, that an occupational disease occurred within the course and scope of employment. INA of Texas v. Adams, 793 S.W.2d 265 (Tex. App.-Beaumont 1990, no writ). "Occupational disease" includes repetitive trauma injuries. Art. 8308-1.03(36). The date of injury in the case of an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. Art. 8308-4.14. An insurance carrier is liable for an occupational disease arising out of the course and scope of employment if it insures the employer where the employee was last injuriously exposed to the hazards of the disease. Art. 8308-3.01(b).

After reviewing the record, we are of the opinion that there is sufficient probative evidence to support the findings and conclusions of the hearing officer relating to the issues before him. Although the appellant complains of a "changing" date of injury, we find nothing indicating that this is anything more than the respondent's attempt to describe, as best as he could, the circumstances of a repetitive and cumulative injury which, by its very nature, cannot be identified to a particular accident. The hearing officer's finding that (date of injury) is the date of injury is supported by the evidence as well as within the provisions of Art. 8308-3.01(b).

On the issue of whether the appellant received proper notice of the contested case hearing, we find that it did. The February 26th hearing was a continuance of the original hearing. Consequently, the rule that applies is Tex. W.C. Comm'n. Rules, 28 TEX. ADMIN. CODE §142.10 (Rule 142.10). This rule covers motions for continuance made during, as well as before, a hearing. Rule 142.10(d) states that:

> The hearing officer will rule on the request, and notify all parties of the ruling. A ruling granting the continuance will include notice of the date, time, and location of the rescheduled hearing.

There is no requirement that a ruling on a continuance be made in writing. In this case, both parties were present on December 9, 1991, to receive the ruling of the hearing officer on the continuance requested by appellant. There is no requirement in the rules

for service of notices of a continued hearing on the attorney of an insurance carrier. *See* Rule 102.5. In any case, this particular carrier and its attorney are divisions of the same entity, the Attorney General. Appellant does not dispute that the State Employees' Workers' Compensation Division had actual notice of the hearing. Moreover, in this case, the record indicates that the appellant was not present because its designated representative forgot about the hearing. The hearing officer was well within his authority, under such circumstances, and given the actual notice given of the hearing, to go forward on February 26, 1992. *See* Appeals Panel Decision No. 91052 (Docket No. HL-00001-91-CC-1), decided on November 27, 1991.

The additional items submitted by the appellant, untimely, and for the first time on appeal, will not be considered in this appeal, absent a showing that the exercise of due diligence would not have elicited the information in time for the contested case hearing. Art. 8308-6.41(a); 6.42(a)(1). *See also* Appeals Panel Decision No. 91121 (Docket No. HO-X074667-01-CC-HO42) decided February 3, 1992. Given what we have previously stated regarding the disputed dates of injury, the new evidence would not, in any case, probably produce a different result if considered. *See* Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983).

Finally, although the hearing officer stated that in Conclusion of Law No. 5 that the appellant had "waived" its right to present proof, it is clear that he is referring to the practical effect of the fact that appellant did not appear at the contested case hearing, rather than to a waiver such as that found under Article 5.21(a). One of the four issues unresolved after the benefit review conference was whether the appellant had sufficient evidence in its possession to contest compensability. This conclusion of law simply sets forth his response to this issue. We do not agree, under these circumstances, that the hearing officer has abused his discretion.

The decision of the hearing officer is affirmed.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge